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SUPREME COURT, U.S.

No. 07-421

IN THE
SUPREME COURT OF THE UNITED STATES

WKB ASSOCIATES, INC.

Petitioner,

v.

FAIR HOUSING COUNCIL, INC.;
CENTER FOR ACCESSIBLE LIVING, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY OF PETITIONERS

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QUESTIONS PRESENTED

Under the Fair Housing Act, the "failure to design and construct" certain multifamily dwellings is unlawful discrimination against persons with physical disabilities. 42 U.S.C. § 3604(f)(3)(C). Respondents, public interest organizations, filed a civil action alleging that Petitioners built housing that does not comply with the Act's design and construction obligation.

1. Whether the injury in fact requirement for Article III standing is satisfied merely because a plaintiff incurred investigation and other pre-litigation expenses in preparation of filing the lawsuit.

2. Whether a continuing violation theory: (a) delays triggering the two-year statute of limitations in the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), until the date that the last unit in a housing development is sold or rented, regardless of when the unit was designed or constructed; or (b) allows suit against all prior sales of housing units, even if only a single sale occurs within the limitations period.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, WKB Associates, Inc., is a small business incorporated in the Commonwealth of Kentucky that is in the business of developing and building multifamily housing. No public company owns more than ten percent of its stock.

Respondents are the Fair Housing Council, Inc., and the Center for Accessible Living, Inc., which are Kentucky non-profit corporations concerned with issues of housing discrimination and the development of housing that is accessible to the physically disabled.

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I. THE COURT SHOULD DECIDE THE QUESTION PRESENTED ON ARTICLE III STANDING.

A. The Circuit Split is Resolute, on Whether Pre-Litigation Investigation Expenses Satisfy the Injury Requirement for Standing.

Respondents argue that Petitioner[1] "fabricate[d]" a conflict on the injury in fact requirement for Article III standing. Opp. 11. However, the court of appeals itself recognized that, in "[i]nterpreting *Havens*, the circuits courts *have reached varying conclusions* about the showing that an organization must make to demonstrate standing under the Fair Housing Act." App. 16a (emphasis supplied). It cited and discussed cases from other circuits regarding whether pre-litigation expenses provide the requisite concrete and particularized injury. Pet. 17-22. The court of appeals "highlight[ed] the different approaches," and acknowledged that "[t]he circuit courts differ" on the appropriate legal standard. *Ibid.* It considered the "more restrictive approach" (App. 16a-18a) championed by the Third, Fifth, Ninth and District of Columbia Circuits (App. 16a-18a), and then

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1 The court of appeals issued a judgment against WKB Associates, Inc., as well as the Village of Olde St. Andrews, Inc., and the Village appeared as a named-party in the caption of the order to be reviewed. *Fair Housing Council, Inc. et al. v. Village of Olde St. Andrews, Inc.* et al., 210 Fed. Appx. 469, 2006 WL 3724128 (6th Cir. 2006). However, Respondents are correct that the Village did not notice an appeal. Opp. 3, n. 2. To eliminate any confusion, WKB Associates is the sole petitioner.

catalogued the "more lenient approach" of the Second, Seventh, and Eighth Circuits. App. 18a-19a. The court of appeals announced it "falls into the latter group, taking a . . . lenient approach." App. 19a.

Likewise, the district court recognized that "[n]ot all circuits have reached the same conclusions" on organizational standing. App. 47a. Other circuits and the FHA literature also discuss the split on organizational standing. See, *e.g.*, *Fair Hous. Council of Suburban Phila. v. Mont. Newspapers*, 141 F.3d 71, 78-79 (3d Cir. 1998) ("[a] number of our sister courts have . . . adopted different views of whether the injury necessary to establish standing flows automatically from the expenses associated with litigation"); Dash T. Douglas, *Standing on Shaky Ground: Standing Under the Fair Housing Act*, 34 Akron L. Rev. 613, 626-631 (2001) (describing "liberal," "strict" and "middle-ground" interpretations of the *Havens* holding on organizational standing). Thus, it is well-accepted that a circuit conflict exists on the standing question presented.

Respondents further argue that Petitioner's use of the term "pre-litigation expenditures" is "unfair." Opp. 11. But again, the court of appeals and the district court both understood the issue as whether costs for pre-litigation testing and investigation satisfy Article III. The court of appeals stated, "the district court reluctantly found that the Plaintiffs' *prelitigation investigation expenses* related to the three testers . . . were sufficient to confer standing." App. 14a (emphasis supplied). As for itself, the court of appeals found that "*costs related to prelitigation investigation* can form the basis for standing." App.

19a (emphasis supplied). The district court explained the issue before it as follows:

> Defendants contend that the *pre-litigation investigation* in this case is just as 'manufactured' as the cost of the litigation itself, and will render the Article III requirements meaningless because any organization can create standing merely by 'investigating' the claim *before filing suit.* Defendants' argument has a good deal of appeal . . . . Here, it appears that Plaintiffs' investigation efforts were no more than *a necessary precursor of this litigation* . . . .
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> * * *
>
> Although Defendants' arguments are very persuasive, the Court cannot ignore that in *Hooker* the Sixth Circuit found standing in a case very similar to the present. *See Hooker v. Weathers,* 990 F.2d 913, 915 (6th Cir. 1993). There, the only apparent allegation of injury was *pre-litigation investigation* expenses for testers who confirmed defendants' allegedly discriminatory conduct. *Id.,* 914-15.
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> * * *
>
> If it were not for the *Hooker* opinion, the Court would almost certainly conclude that *pre-litigation investigation* in this case is insufficient to establish standing under Article III.

App. 54a-55a (emphasis supplied).

The thrust of Respondents' argument is that the investigation expenses they incurred *before* suing WKB satisfy Article III, and stand apart from the resources they spent *after* suing WKB. Opp. 11-13. Indeed, the court of appeals held that a plaintiff must "show some injury that is independent of the costs of litigation" but unlike other circuits, it "interpreted that standard narrowly, finding that *costs related to prelitigation investigation* can form the basis for standing." App. 19a (emphasis supplied). This is precisely the question presented in the petition: Do pre-litigation costs spent on investigation fulfill the injury requirement for Article III standing?

WKB submits that costs for testers and initial factual investigation which establish the very basis for a suit are not, as a matter of law, "independent"[2] from that suit. See Pet. 18-20 (citing opinions from the D.C., Third, Fifth, and Ninth Circuits, all requiring expenditure of resources "independent" of the lawsuit to satisfy Article III standing). The FHC's civil action against WKB could not have existed without the penultimate acts of testing; the lawsuit was contingent upon the prior factual investigation. Indeed, Respondents' formalistic insistence that pre-litigation investigation is not part of litigation defies their Rule 11 obligation, to undertake "an inquiry reasonable under the circumstances" to ensure their

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2 "Independent" means "... **3.** not influenced by the thought or actions of others; *independent research*. **4.** not dependent; not depending or contingent upon something else for existence, operation, etc. **5.** not relying on another or others for aid or support." *Webster's Encyclopedic Unabridged Dictionary of the English Language* 970 (Random House 2001) (original emphasis).

claims were "nonfrivolous" and that their "allegations and other factual contentions [had] evidentiary support . . . ." Fed. R. Civ. P. 11(b)(2), (3).

Only this Court can decide the contours of Article III. Respectfully, the petition should be granted to determine whether necessary pre-suit investigation into the defendant's conduct provide independent injury for a federal "case or controversy."

B. Aside From Costs Spent on Pre-Suit Investigation, Respondents Have Produced No Evidence of Injury.

Respondents are imprecise to assert that *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), "controls the Article III analysis in this context . . . ." Opp. 20. It is the other way around; Article III controls the analysis, whether the plaintiff is a fair housing organization, a taxpayer, an environmental group, or any other litigant seeking to invoke the federal courts' limited jurisdiction. Accordingly, at this juncture, mere allegations of harm are inadequate. Respondents must set forth by affidavit or other evidence specific facts to satisfy standing prerequisites. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

Respondents attempt to conjure a question of fact on the nature of their injury. Their tactic is unavailing upon a contextual examination of their selective use of record excerpts. When asked to provide a "monetary value" for how much FHC had been injured, its corporate representative responded: "I don't know that I can." Baize Depo; App. 122a.

And while Respondents report that "the total economic harm to the Council was around $60,000," (Opp. 17), they neglect to inform it based that figure on:

> The time spent by staff members *on the case;* the outside consultants we brought in *on the case;* the materials that we used involved *in the case,* the testing fees; just anything that – anything that – any money we spent *on the investigation or litigation.*

Baize Depo.; App. 122a. (emphasis supplied).

Such pre-litigation investigation represents the *only* type of injury that Respondents sustained, as contained in the record and considered by the lower courts. Petitioner recognizes that the FHC conducted investigations at the Village of Olde St. Andrews. See Opp. 16 (site visits, inspections, research into ownership, reviewing plans and permits, taking photos, training and debriefing testers). The district court found that "the *only* actual evidence . . . in the record that supports Plaintiffs' allegation of investigation costs incurred prior to litigation" was their expenditures of about $150 on three testers to conduct "on-site accessibility tests" at Olde St. Andrews. App. 53a-54a. (emphasis supplied). The court of appeals decided such expenses were sufficient for Article III purposes: "the resources that the Fair Housing Council directed toward training and employing testers to investigate the Village of Olde St. Andrews constitutes a concrete injury." App. 26a. However, whether pre-litigation injury passes Article

III muster is the legal question for this Court to resolve.

The FHC tries to come within *Havens*, where the organization alleged that racial steering "frustrated" efforts to provide "counseling and referral services" for minorities seeking housing. *Havens*, 455 U.S. at 379. But *Havens* provides it no solace. That case found the organizational plaintiff *alleged* sufficient injury to survive a motion to dismiss, but at trial it needed to *prove* "it has indeed suffered impairment in its role of facilitating open housing." *Id.* at 379, n. 21. Here, the FHC has not proved it stepped-up any services for disabled home-seekers. It cites (Opp. 17) deposition testimony that the organization "got a lot more involved with accessibility . . . ." App. 130a; Baize Depo. at 48-49, 72. No quantum of evidence is offered to prove these bald statements. Respondents also claim to have "initiated several new projects to undo the damage" allegedly caused by WKB's developments, such as giving presentations, increasing accessibility tests, and applying for HUD enforcement grants. Opp. 17; App. 73a. Review of its proffered interrogatory response (App. 71a-74a) wholly lacks particularity on these putative projects. No facts are provided to flesh out the nature of any of these allegations, or why these activities are traceable to WKB's conduct.

Respondents also claim injury because they "diverted resources away from other projects." Opp. 16. Yet again, the underlying record provides no evidence to describe these lost opportunities with concreteness. In any event, the "lost opportunities" argument is merely the flip-side of the "pursuit of

litigation" coin. As the court of appeals stated, "every expenditure of money, time or other resources results in the loss of the benefit that would have resulted if the same time or money had been spent on something else." App. 24a. See also *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (deflection from housing counseling to legal efforts are "opportunity costs of discrimination, since although the counseling is not impaired directly there would be more of it were it not for the defendant's discrimination"). In other words, an organizational plaintiff can always point to some other activity it would have pursued if not for the expense of litigation. Like injury purportedly derived from pursuit of litigation, complaints about lost opportunities are a façade.

To conclude, Petitioner is correct that: "There is no evidence in the record—not in any interrogatory response (App. 67a-100a) or deposition testimony (App. 101a-153a)—showing that FHC suffered some present, tangible injury separate and apart from its costs to investigate and file this specific suit." Pet. 15.

II. THIS COURT SHOULD DECIDE THE CORRECT TRIGGERING EVENT FOR THE FAIR HOUSING ACT'S STATUTE OF LIMITATIONS.

The court of appeals mobilized a "continuing violation" theory to hold that that the FHA's limitations period starts upon the sale or rental of dwelling units. Pet. 26. While the petition was being prepared for printing, the Ninth Circuit issued a contradictory ruling on this point. In *Garcia v. Brockway*, 503 F.3d 1092, 1096 (9th Cir. 2007), the

court decided that the FHA's limitations provision is "triggered at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued."[3] *Garcia* is discussed in more detail in the amicus brief of the National Multi-Housing Council, *et al.* Amicus Br. 14-15, 17-18. Significantly, the Ninth Circuit read the statute consonant with WKB's interpretation (Pet. 27): 42 U.S.C. § 3604(f)(3)(C) "is a coordinate section, not a subordinate section within (f)(1) . . . . [T]reating (f)(3)(C) as subordinate makes no structural sense." *Garcia*, 503 F.3d at 1096, n. 1.

Commencing the limitations period upon sale or rental creates tremendous practical difficulties. WKB's scenario regarding multiple sales, rentals, and subleases of housing units (Pet. 28) goes unaddressed by Respondents. Moreover, the position they advocate, that the court of appeals adopted, actually disserves the FHA's remedial goals. It makes little sense to conclude that sale or rental is the correct triggering event, when viewed against the fuller spectrum of housing discrimination acts outlawed by Section 804:

> (a) To refuse to *sell or rent* . . . or *otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin . . . .

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3 The *Garcia* dissent expressly noted the disagreement between the majority's opinion and the court of appeals' decision in this case. *Garcia*, 503 F.3d at 1104 (Fisher, J., dissenting) (citing *Fair Hous. Council v. Vill. of Olde St. Andrews*, 210 Fed. Appx. 469 (6th Cir. 2006)).

> (c) To make, print, or publish . . . any notice, statement, or advertisement . . . with *respect to the sale or rental of a dwelling* that indicates any preference . . . or discrimination based on race, color, religion, sex, handicap, familial status, or national origin . . . .
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status or national origin that any dwelling *is not available* for inspection, *sale, or rental* when such dwelling is in fact so available . . . .
>
> (f)(1) To discriminate *in the sale or rental, or otherwise make unavailable or deny,* a dwelling to any buyer or renter because of a handicap . . . .

42 U.S.C. § 3604(a), (c), (d) and (f) (emphasis supplied). The Act's 2-year limitations period for civil actions governs all of these discriminatory acts. See 42 U.S.C. § 3613(a)(1)(A).

While the case at bench implicates only subsection (f)(1), it must be read in conjunction with those surrounding provisions. Each subsection within Section 804 covers specific acts of housing discrimination in the general context of "sale or rental" of dwellings. Under Respondents' logic, the limitations period pertinent to these discrete acts would commence only upon sale or rental of dwellings. Such an approach would subvert the FHA's goals. Unlawful housing discrimination frequently occurs *absent* sale or rental.

In *Havens*, for example, subsection (d) discrimination occurred upon the act of dissemination of false information on housing availability. Section 804(d) was violated when the realtor communicated the information, *regardless* of whether a sale or rental ever occurred. Likewise, in *Spann v. Colonial Vill., Inc., et al.*, 899 F.2d 24, 27 (D.C. Cir. 1990), the challenged act was the publication of discriminatory advertising under Section 804(c); the limitations provision ran from the date of publication, not from the date of any sale or rental of units portrayed in the illegal ads. Similarly, Section 804(a) has been interpreted to cover discriminatory land use actions by municipalities. This Court affirmed an FHA violation brought under subsection (a), where a town refused to amend an ordinance that perpetuated segregation by restricting low-income multifamily housing projects to a largely minority area. *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988) (*per curiam*). Under Respondents' reasoning, the statute of limitations would have never started to run in *Huntington Branch*, because the sale or rental of multifamily units would never have occurred following the town's decision to prohibit low-income housing.

The only reasonable construction of Section 804 against the limitations period in Section 813(a)(1)(A) is that the specific discriminatory action covered by each subsection triggers the start of the two-year clock—not the generic "sale or rental" of dwellings. The Court has "repeatedly recognized that Congress legislates against the 'standard rule that the limitations period commences when the plaintiff has a

complete and present cause of action.'" *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005), citing *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201 (1997). Moreover, in discerning the triggering event for the statute of limitations as applied to subsection (f), rules of construction dictate that the surrounding subsections must be considered. *See, e.g., United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). To ensure consistent interpretation with the other forms of discrimination made unlawful by Section 804, the underlying discriminatory act in subsection (f) that triggers the FHA's limitations period must be non-compliant design or construction of dwellings, *not* their sale or rental.

To conclude, the court of appeals' decision that sale or rental is the triggering event for limitations purposes conflicts with the Ninth Circuit, is unworkable as a practical matter, and cannot be reconciled with the FHA's text and structure. This Court should intervene to resolve the question.

CONCLUSION

For all of the foregoing reasons, and the reasons presented in the petition, the Court should grant certiorari.

December 10, 2007

Respectfully submitted,

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